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The Honorable Thomas E. Wheeler
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Implementation of Section 103 of the STELA Reauthorization Act of 2014, MB Docket No. 15-216
Written Ex Parte Communication

Dear Chairman Wheeler:

As mandated by Section 103 of the STELA Reauthorization Act, the Commission has initiated a rulemaking proceeding to review the "totality of the circumstances test" used in determining whether retransmission consent negotiations have been negotiated in "good faith" as required by Section 325(b)(3) of the Communications Act.

Mediacom Communications Corporation is pleased that the Commission's Notice of Proposed Rulemaking ("*NPRM*") acknowledges and seeks comment on a number of proposals that Mediacom previously has put forward and/or supported. Mediacom notes, however, that the *NPRM* does not expressly address other potential solutions for dealing with the market conditions and broadcaster practices that have given rise to the current breakdown in the retransmission consent regime.

Mediacom recognizes that the *NPRM* invites comment on "any other practices that should be considered evidence of bad faith under the totality of the circumstances test." However, rather than wait until it files initial comments to offer up these additional proposals, Mediacom is presenting them here in order to give all interested parties the fullest possible opportunity to address them.

Refusals to agree to continuation of carriage prior to total breakdown in negotiations. Blackouts are contrary to the public interest and should occur only in circumstances where the parties effectively have reached a final agreement to disagree – a final impasse. If either side to the negotiation is willing to continue to negotiate and supports their request for additional time with the submission of a new counteroffer that makes concessions that are more than *de minimis* in nature, the refusal of the other negotiating party to agree to the extension should be considered evidence of bad faith. Put another way, the Commission should declare that it is evidence of bad faith when a negotiating party plays the blackout card as a bullying tactic and is unable to demonstrate that it has an independent reason for causing disruption to consumers at that point in the negotiating process. An extension should not be available unless the MVPD agrees to continue to pay during the interim period at the highest price it has offered in the negotiations prior to the beginning of the extension and to subsequently "true up" the interim payments if the deal finally reached is at a higher rate.

Setting non-uniform dates for expiration of retransmission consent agreement. As enacted by Congress in 1992, the retransmission consent provision calls for new elections to be made every three years on a specific schedule. However, in practice, retransmission consent agreements are sometimes struck for periods longer or shorter than three years. This has allowed broadcasters to artificially manipulate the expiration dates of their retransmission consent agreements with different MVPDs in a way that maximizes the stations' leverage without providing any benefit to the public. The playing field would be levelled if the date on which retransmission consent agreements expired in a DMA had to be consistent for all MVPDs, as Mediacom thinks Congress intended.

Demands by local broadcasters for consideration unrelated to their investment in local broadcast programming production and/or in the expansion of free over-the-air access to their programming. The legislative history of the retransmission consent provision makes it absolutely clear that Congress' ultimate goal was to address concerns that local broadcasters were subsidizing competition from cable networks and that, as a result, the public's future access to free, locally originated news, weather, and public affairs broadcast programming was at risk. Retransmission consent was <u>not</u> intended to subsidize the acquisition of programming by the national broadcast networks or the creation or purchase of new non-broadcast networks by the networks or large station groups.

Yet, while broadcasters' public statements and Commission filings invariably claim that local stations need retransmission consent fees in order to continue to produce local news and that those fees are actually used for that purpose and in other ways beneficial to consumers, there is not a shred of evidence that this is the case. In fact, the available evidence indicates that the corporate parents' of local stations transfer a significant part of the retransmission consent money they receive to the national broadcast networks and use the balance to acquire additional stations, fund dividends or stock repurchases, or acquire or support unrelated businesses.

The Commission's current rules abet the broadcasters in this regard by allowing broadcasters to claim during a retransmission consent negotiation that they need a particular level of retransmission consent revenue to fund the production or acquisition of locally-oriented programming without having to provide any factual data to back up such claims. The Commission's good faith rules should ensure that there is a substantial link between what broadcasters demand in exchange for retransmission consent and what they do with the fruits of those demands. For example, a broadcaster's inability to demonstrate that it is investing the proceeds it receives from retransmission consent in local programming production should be considered evidence that the broadcaster is not negotiating in good faith. Similarly, as suggested in Mediacom's July 7, 2015 Petition for Rulemaking (RM-11752), the Commission should consider linking a station's retransmission consent demands with its investment in facilities that will expand the number of homes that can access the station's local content for free.

Invoking network exclusivity rights during a blackout imposed by the broadcaster. It is indisputable that uninterrupted carriage of a local station's signal by all of the MVPDs in a market is huge benefit for the station, allowing it to increase advertising revenues by extending its audience reach beyond the areas where a reliable off-air signal is available. The evidence from past station blackouts in retransmission consent disputes demonstrates that a large majority of the affected MVPD's subscribers will not drop their subscriptions and switch to an alternative, although the number who do switch may be sufficient to inflict enough economic damage on the MPVD to force it to accede to the broadcaster's demands. Thus, when a broadcaster imposes a blackout on consumers, it is betting that the MVPD will suffer significant subscriber losses before the negative impact on the station's advertising revenues reaches an unacceptable level. The broadcaster is helped by the fact that when a deal is finally reached, the broadcaster's audience and advertising will quickly recover, while the MVPD may never recover a significant portion of the subscribers who switched service providers.

The broadcaster, in other words, does not force a blackout because it concludes that it is a rational decision that best serves its long-term economic and business interests. Instead, the blackout is a coercive tool used to gain a short-term negotiating advantage and force the MVPD to accept terms that the MVPD does believe to be fair, reasonable, or consistent with competitive market conditions. The raw power that a blackout confers upon the broadcaster rests on a foundation constructed through the collusion of the national networks and their affiliates under which each local network affiliate has a monopoly over the transmission of popular network programs within its DMA.

The use by a negotiating party of coercive tactics to force concessions by the other party is the very antithesis of the concept of good faith negotiations. Moreover, this particular tactic is not only detrimental to the affected MVPD, but also to the consumers it serves. When there is a blackout, the existence of network exclusivity rights means that consumers are forced to either forego viewing popular network programming or suffer the not-insignificant cost and inconvenience of switching providers.

The Commission should not allow stations to use this tactic in negotiations that are required to be conducted in good faith. Accordingly, Mediacom's comments will propose that practices constituting *per se* bad faith negotiation include the invocation of contractual or other network exclusivity rights by a broadcast station that has imposed a blackout when the MVPD is willing to continue negotiations and make meaningful offers and counteroffers. To make such a rule effective, the Commission would also have to establish that it is bad faith for an out-of-market station to refuse to accept an offer by the MVPD to retransmit its signal in substitution for that of the blacked-out station at a price and on terms at least as favorable as those extended to a comparable MVPD in its own market or to contractually agree with a network or other stations to a restriction that would prevent acceptance of such an offer.

Interim carriage and arbitration remedies. The *NPRM* is strangely silent with respect to the means by which the duty to negotiate in good faith can and will be enforced. Forfeitures alone cannot provide an adequate remedy for violations of the good faith negotiation requirement. This is because forfeitures will not deter a broadcaster from engaging in bad faith tactics unless those forfeitures are set at a level that equals or exceeds the extra revenues that the broadcaster may be able to secure by engaging in bad faith tactics. Indeed, the risk of incurring a forfeiture may simply become a cost of business that broadcasters seek to recover in setting the cost of retransmission consent. And, in any event, forfeitures will not, and cannot, undo the disruption that results if bad faith negotiating tactics result in an interruption of service or the harm suffered by consumers forced to bear the cost of retransmission consent fees that do not reflect the product of a good faith negotiation.

The Commission is able, and must be willing, to impose equitable remedies, such as a re-opening of negotiations for a ninety day period upon a *prima facie* showing of bad faith, together with a requirement that service continue (or be restored) during this 90 day period. And if the parties remain at an impasse after 90 days, the Commission should have in its arsenal of remedies the option of ordering the parties to submit to mandatory arbitration conducted on a self-supporting, loser pays basis. We are confident that inclusion of the remedies issue in the discussion generated by the *NPRM* will lead to other suggestions worthy of consideration.

Miscellaneous proposals. Mediacom also expects to propose that the Commission declare that each of the following kinds of behavior by broadcasters is inconsistent with the obligation to negotiate in good faith:

- Insisting as a condition of granting retransmission consent that the MVPD waive its right to pursue remedies for broadcaster conduct believed by the MVPD to violate law or that the MVPD acknowledge that no such violations occurred;
- Requiring the MVPD to install a set-top box in subscribers' homes or any specified number of television receivers in the home; and
- Refusing to offer the MVPD the opportunity to obtain the same non-economic rights or benefits granted to another MVPD in the same market on the same or reasonably comparable terms.

Mediacom intends to expand on these proposals in its comments on the *NPRM* and looks forward to reviewing the comments of other stakeholders. Mediacom also reserves the right to address any of the proposals raised in the *NPRM* as well as any other proposal that would result in a retransmission consent regime that serves Congressional goals and the public interest.

Sincerely,

Seth A. Davidson
Counsel to Mediacom Communications Corporation

cc: Office of Commissioner Mignon Clyburn
Office of Commissioner Jessica Rosenworcel
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William Lake, Chief, Media Bureau